UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

PERTANICKA MOUTON, Plaintiff, v. RUSSELL AUGUSTINE, *et al.*, Defendants.	Civil Action No. 6:13-cv-01666 Judge Richard T. Haik, Sr. Magistrate Judge C. Michael Hill

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UNITED STATES OF AMERICA'S STATEMENT OF INTEREST

I. INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address the whether the Fair Housing Act ("FHA"), 42 U.S.C. § 3601 *et seq*., covers discriminatory conduct that occurs after the initial acquisition of housing. The United States Department of Justice and the United States Department of Housing and Urban Development ("HUD") share enforcement authority under the FHA. *See* 42 U.S.C. §§ 3610, 3612(a)–(b), (o), 3613(e), and 3614. The United States thus has a strong interest in ensuring the correct interpretation and application of the provisions at issue in this case.

II. BACKGROUND

On June 13, 2013, Pertanicka Mouton filed a complaint in this action alleging that she had been sexually harassed by Russell Augustine, manager of Live Oak Manor Apartments. ECF No. 1. On March 2, 2015, Plaintiff filed an Amended Complaint alleging that Mr. Augustine's sexual harassment of Ms. Mouton violated the Fair Housing Act, 42 U.S.C. §§ 3604(a)–(c) and 3617, as well as state law. ECF No. 32.

Plaintiff's Amended Complaint alleges that, at the beginning of January 2011, Ms. Mouton went to the rental office at Live Oak Manor to inquire about an apartment for rent. ECF No. 32, Amended Compl. ¶¶ 11–12. Live Oak Manor was the only low-income housing in Abbeville that Ms. Mouton knew of with available units. *Id.* ¶ 10. When Ms. Mouton asked about an apartment, Mr. Augustine told her that he would rent an apartment to her immediately if she would go on a date with him and accompany him to a hotel. *Id.* ¶¶ 12–16. Ms. Mouton refused and left the rental office. *Id.* ¶ 17. From January through June 2011, Mr. Augustine delayed renting an apartment to Ms. Mouton while repeatedly soliciting, both in person and over the phone, dates and sex from her in exchange for an apartment. *Id.* ¶¶ 18–41. On Ms. Mouton's second visit to the rental office to inquire about her application, Mr. Augustine attempted to hug and kiss her and grab her rear-end. *Id.* Ms. Mouton declined all advances. *Id.*

In May 2011, Ms. Mouton was living on a temporary basis with family members and friends and needed an apartment as soon as possible, so she returned again to Live Oak Manor to ask about her application. *Id.* ¶ 28. Mr. Augustine called the owner of Live Oak Manor, Amir Batoei, and Mr. Batoei instructed Mr. Augustine to rent an apartment to Ms. Mouton if one was available. *Id.* ¶¶ 7, 29. During the walk-through, Mr. Augustine continued to solicit Ms. Mouton for a date and sex. *Id.* ¶¶ 33–35.

Ms. Mouton signed a lease and moved into an apartment at Live Oak Manor on June 15, 2011. *Id.* ¶¶ 40–41. The lease contained provisions such as requiring the landlord to provide notice and receive permission prior to entering the apartment and requiring the landlord to maintain the property. ECF No. 1-2, Model Lease for Subsidized Programs, at 7, 12. After Ms. Mouton moved into the apartment, Mr. Augustine's sexual harassment intensified. Amend. Compl. ¶ 44. Mr. Augustine continued to solicit Ms. Mouton for sex, telling her that she "owed

him" for renting her an apartment. *Id.* ¶ 45. He sat in his car and watched her apartment, and Ms. Mouton later discovered that one of the security cameras was positioned to watch her apartment. *Id.* ¶ 46, 64. He entered her apartment on several occasions without notice or permission, including one occasion when she was in her apartment and not fully dressed and Mr. Augustine refused to leave. *Id.* ¶¶ 49–52. Ms. Mouton reported Mr. Augustine's harassment to the owner, a supervisor, and an Abbeville councilman. *Id.* ¶¶ 57–59, 63. Ms. Mouton also called HUD and filed a written complaint with the Louisiana Housing Corporation, *id.* ¶¶ 65–66, a state agency responsible for ensuring safe and affordable housing in Louisiana.

In November 2011, Ms. Mouton received an eviction notice. *Id.* ¶ 60. When she went to the office to inquire about the notice, Mr. Augustine told her he had issued it so she would have to come to the office to see him. *Id.* ¶ 61. Ms. Mouton also received eviction notices in December 2011 and February 2012. *Id.* ¶ 62. Live Oak Manor did not pursue eviction proceedings related to any of the three notices. *Id.* ¶ 61–62.

During her tenancy at Live Oak Manor, Ms. Mouton submitted many maintenance requests that were not addressed. *Id.* ¶¶ 53–56. As a result, Ms. Mouton withheld rent payments in January, February, and March 2013. *Id.* ¶ 69. In late February 2013, Ms. Mouton received an eviction notice for non-payment of rent. *Id.* ¶ 70. After Ms. Mouton explained to the judge that Live Oak Manor had failed to make necessary repairs, the judge did not permit the eviction but ordered Ms. Mouton to pay the rent she owed. *Id.* ¶¶ 71–72. However, Mr. Augustine refused to accept payment, and Live Oak Manor representatives subsequently demanded that Ms. Mouton pay more than what the judge had ordered, which she refused. *Id.* ¶¶ 73–74. Ms. Mouton received another eviction notice, but she was unable to attend the hearing and submitted a written answer. *Id.* ¶¶75–76. On or about March 21, 2013, Live Oak Manor representatives informed

Ms. Mouton that she was to be evicted, and she and her husband moved out on March 22. *Id.* ¶ 77.

III. ARGUMENT

Defendants' motion seeks to dismiss all claims related to any of Defendants' conduct that occurred after Plaintiff rented an apartment at Live Oak Manor, arguing that "[c]laims of discrimination occurring after her rental of the property, or after she gained access to the property, are not included within the scope of the [FHA's] protection." ECF No. 48-2, Defs. Mem. at 6–7. On the contrary, the language and legislative history of the Fair Housing Act and HUD's regulations clearly support the application of the FHA to post-acquisition discrimination under 42 U.S.C. § 3604 and § 3617. The Fifth Circuit's holding in *Cox v. City of Dallas*, 430 F.3d 734 (2005), is limited to claims by current homeowners against third parties regarding the habitability of their property and does not preclude FHA coverage of claims of discrimination by a landlord against a current tenant. In addition, § 3617 prohibits a broad range of conduct, including the post-acquisition conduct alleged in this case. This Court should deny Defendants' motion and allow Plaintiff to proceed on all FHA claims.[1]

A. Standard of Review

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A motion to dismiss under 12(b)(6) is viewed with disfavor and is rarely granted." *Leal v. McHugh*, 731 F.3d 405, 410 (5th Cir. 2013) (internal quotations and citations omitted).

[1] The United States' brief addresses only the portions of Defendants' motion dealing with the provisions of the FHA.

B. The Fair Housing Act Prohibits Post-Acquisition Discrimination

The FHA makes it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of . . . sex." 42 U.S.C. § 3604(a). The FHA also makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . sex." 42 U.S.C. § 3604(b). By their plain terms, these provisions prohibit post-acquisition discrimination, and nothing in the statute indicates that the FHA should be limited to discrimination that occurs during the initial sale or rental transaction.

1. The language and history of the FHA make clear that the statute was intended to protect against post-acquisition discrimination

The limited FHA legislative history shows that Congress did not intend to limit the FHA to discrimination occurring at the time of sale or rental. In fact, the first section of the Senate draft of the statute stated that it was "the policy of the United States to prevent discrimination on account of race, color, religion, or national origin in the purchase, rental, financing, and *occupancy* of housing throughout the United States." 114 Cong. Rec. 2270 (1968) (emphasis added). Occupancy necessarily occurs post-acquisition, and Congress thus contemplated post-acquisition application when drafting the legislation. Congress ultimately collapsed "purchase, rental, financing and occupancy" into the summary phrase "fair housing": "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601.[2] The broad intent remains, as there is nothing in the revisions that

[2] The first three versions of the bill contained this original Declaration of Policy. The changes were not accompanied by any substantive changes. Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 Ala. L. Rev. 203, 230–31 (2006). As one observer has commented, "[i]f anything, the fact that a prohibition against discrimination in all aspects of housing—sales, rentals, financing, and occupancy—was included in the first three versions of the bill but omitted from the final version in favor of a broad statement of commitment to fair housing,

suggests a lessened degree of protection. The Supreme Court in *Trafficante v. Metropolitan Life Insurance Co.* cited the FHA debates to show that "the reach of the proposed law was to replace the ghettos 'by truly integrated and balanced living patterns.'" 409 U.S. 205, 211 (1972) (quoting 114 Cong. Rec. 3422 (1968)); *see also* 114 Cong. Rec. 2275–76, 2279 (1968) (noting that the Congress was "committed to the principle of living together," and sought to promote neighborhoods with interracial "good harmony"); *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2521 (2015) (recognizing broad purpose of the FHA "to eradicate discriminatory practices within a sector of our Nation's economy" (citing 42 U.S.C. § 3601 and H.R. Rep. No. 711, 100th Cong., 2d Sess., at 15 (1988)).[3]

The Supreme Court has also held that where a statute is silent or "ambiguous as to whether it includes" certain claims, courts should adopt a reading "more consistent with the broader context" and "primary purpose" of the law. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). Application of the FHA to post-acquisition discrimination is very clearly in keeping with the statute's purpose. Congress's aim was "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. Accordingly, courts have applied the FHA broadly. *Trafficante*, 409 U.S. at 211 (quoting 114 Cong. Rec. 3422 (1968)); *Woods-Drake v. Lundy*, 667 F.2d 1198, 1201 (5th Cir. 1982); *United States v. Collier*, No. CIV.A.08-0686, 2010 WL 3881381, at *9 (W.D. La. Sept. 28, 2010).

In construing a statute, courts should also avoid unreasonable or illogical results. See *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69–70 (1994) (stating that statutory

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indicates that Congress specifically intended 'fair housing' to include the right to purchase, rent, finance, and occupy housing free of discrimination." Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 Harv. C.R.-C.L. L. Rev. 1, 28 (2008).

[3] Other provisions of the FHA also suggest Congress intended the statutory scheme to reach beyond sales and rentals. Section 3605 of the statute plainly indicates a concern with post-acquisition action; it bars discrimination in "real estate-related actions," including loans for "improving, repairing, or maintaining a dwelling." 42 U.S.C. § 3605(b).

construction should not assume Congress intended "odd" results, and courts should not "simply follow the most grammatical reading of the statute" if it creates such results). In sexual harassment cases such as this, if this Court were to reject post-acquisition liability, a landlord need wait only until after the lease is signed to begin his harassment of his female tenants to escape liability. Further, harassment by a landlord's agent, such as a maintenance person, who has no involvement in the initial rental transaction, would not be prohibited by the FHA. This odd result would be inconsistent with the purpose and plain meaning of the statute.

Section 3604(b) protects against discrimination in the "terms, conditions, or privileges of sale or rental" and this language is also fairly read to provide post-acquisition protection. The "terms, conditions, or privileges" flowing from a real-estate transaction should be read to include not only the right to acquire, but the right to inhabit a dwelling. *United States v. Koch*, 352 F. Supp. 2d 970, 976 (D. Neb. 2004) ("[I]t is difficult to imagine a privilege that flows more naturally from the purchase or rental of a dwelling than the privilege of residing therein."). The term "privileges" is particularly suggestive of the right to enjoy the use of a dwelling and would have little meaning if limited to simply the act of sale or rental. The Seventh Circuit has recognized that "the right to inhabit the premises is a privilege of sale," and constructive eviction "by making the premises uninhabitable violates § 3604(b)." *Bloch v. Frischholz*, 587 F.3d 771, 779 (7th Cir. 2009).

Although courts have held that § 3604(b) can encompass a claim for actual or constructive eviction, *see Cox*, 430 F.3d at 746, finding that the FHA prohibits constructive eviction is not enough, because the privilege of inhabiting the premises must also include inhabiting the premises *free from discrimination* under § 3604(b). To hold that a current tenant may not claim discrimination unless the discriminatory conduct is so egregious that it forces the

tenant to move out is contrary to Congress's goal of creating "truly integrated and balanced living patterns." *Trafficante*, 409 U.S. at 211. If a tenant must be denied housing or must vacate the housing to have a claim under the FHA, this purpose is not met. *See Bloch*, 587 F.3d at 782 (citing *Trafficante* and holding that requiring plaintiffs "to vacate their homes before they can sue undoubtedly stifles that purpose").

The need to protect against post-acquisition discrimination is especially clear in a sexual harassment case such as this one. Numerous courts have found that the FHA does reach post-acquisition discrimination, and courts have repeatedly held that sexual harassment of *current* tenants by a landlord or agent violates the FHA. *See The Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 713 (9th Cir. 2009) (rejecting *Cox* and *Halprin* and concluding that the FHA reaches post-acquisition discrimination); *Neudecker v. Boisclair Corp.*, 351 F.3d 361, 364 (8th Cir. 2003) (finding that plaintiff can base a FHA claim on actions occurring post-acquisition and citing sexual harassment hostile environment cases); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) (recognizing claim for sexual harassment hostile housing environment under the FHA); *Honce v. Vigil*, 1 F.3d 1085, 1089–90 (10th Cir. 1993) (recognizing that the FHA prohibits both quid pro quo and hostile housing environment sexual harassment); *Koch*, 352 F. Supp. 2d at 972–81 (rejecting *Halprin* and following *Neudecker* in finding post-acquisition sexual harassment claims actionable under the FHA); *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490, 495–96 (D. Md. 1996) (finding allegations of sexual harassment that occurred during tenancy sufficient to sustain an FHA claim); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988) (recognizing sexual harassment as permissible cause of action under the FHA even where no loss of housing is claimed); *Grieger v. Sheets*, 689 F. Supp. 835 (N.D. Ill. 1988) (upholding "quid pro quo" sexual harassment claim

under § 3604(b) and § 3617).

Courts may also look to employment law for guidance.[4] Title VII bars discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphasis added). These terms, conditions, and privileges are not limited to hiring procedures or even the duration of an employment contract. The "terms, conditions, or privileges" of employment, as "part and parcel of the employment relationship," "may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) (overruled in part on other grounds). The Supreme Court in *Hishon* pointed out that these "privileges" may even survive the employment relationship. "A benefit need not accrue before a person's employment is completed to be a term, condition, or privilege of that employment relationship." *Id.* at 77. The Supreme Court has stated that "terms, conditions, or privileges" are not "limited to 'economic' or 'tangible' discrimination," and reach outside the job contract. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).[5]

2. HUD's regulations are consistent with allowing post-acquisition claims under the FHA.

[4] *See Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project*, 135 S. Ct. 2501 (2015) (Title VII's disparate impact analysis is adapted to the FHA); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935 (2d Cir.), aff'd, 488 U.S. 15 (1988) (finding that Title VII and Title VIII "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination"); *Graoch Assocs. # 33, L.P. v. Louisville/Jefferson County Metro Human Relations Comm'n*, 508 F.3d 366, 372 (6th Cir. 2007) ("[W]e generally should evaluate claims under the FHA by analogizing them to comparable claims under Title VII."); *see also DiCenso v. Cisneros*, 96 F.3d 1004, 1007 (7th Cir. 1996); *Community Servs. v. Wind Gap Mun. Auth.*, 421 F.3d 170, 174 n.3 (3d Cir. 2005).

[5] Plaintiff's Complaint also alleges violations of § 3604(c), which prohibits any statement "with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . sex." 42 U.S.C. § 3604(c). For the reasons already discussed, § 3604(c) is not limited to statements made at the time of sale or rental. *See Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *7 (M.D. Fla. May 2, 2005) (finding that the phrase "with respect to the sale or rental of a dwelling" includes discriminatory statements made after the acquisition of property and finding allegation that defendant told plaintiff she would be evicted if she did not keep quiet about his sexually hostile behavior sufficient to state a claim under § 3604(c)).

In 1988, Congress authorized HUD to promulgate interpretive rules under the FHA. *See* 42 U.S.C. §§ 3601 note, 3614a. HUD's regulations are consistent with the purposes of the FHA, interpreting § 3604(b) to bar "[f]ailing or delaying maintenance or repairs of sale or rental dwellings because of . . . sex; "[l]imiting the use of privileges, services, or facilities associated with a dwelling because of . . . sex . . . of an owner, tenant or a person associated with him or her"; and "[d]enying or limiting services or facilities in connection with the sale or rental of a dwelling, because a person failed or refused to provide sexual favors." 24 C.F.R. § 100.65(b). HUD's interpretation is entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

Chevron requires that "if the statute is silent or ambiguous with respect to the specific issue," a court should ask only "whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. Though the language of the FHA on the precise question of post-acquisition liability under § 3604 may not be completely clear, HUD has provided a reasonable interpretation that is entitled to substantial deference. A court may not "simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* An agency may, through rulemaking, "fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). Thus, HUD's regulations may clarify what housing rights the FHA created. Regulations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844.

C. The Fifth Circuit's Holding in *Cox v. City of Dallas* Is Inapplicable in a Case Alleging Sexual Harassment by a Landlord

Defendants urge this Court to read the Fifth Circuit's opinion in *Cox v. City of Dallas*,

430 F.3d 734 (2005), as prohibiting Plaintiff from bringing any FHA claims relating to the sexual harassment by Mr. Augustine that occurred after Ms. Mouton acquired the apartment. Defs. Mem. at 6–8. However, *Cox* does not preclude a post-acquisition sexual harassment claim by a tenant.

In *Cox*, plaintiffs sued the City of Dallas for failing to prevent, for many years, illegal dumping at a site near their homes. *Id.* at 736. Plaintiffs argued that the City had violated § 3604(a) and (b) of the FHA because the illegal dumping lowered the value of their homes, made the land used for dumping unavailable for future housing, and discriminated in the "service" of the enforcement of zoning laws. *Id.* at 740, 744, 745. With regard to plaintiffs' claims under § 3604(a), the court held:

> This is not to say that a current owner has no claim for attempted and unsuccessful discrimination relating to the initial sale or rental of the house, an issue we do not decide. And it is not to say that a current owner or renter evicted or constructively evicted from his house does not have a claim. We hold only that § 3604(a) gives no right of action to current owners claiming that the value or "habitability" of their property has decreased due to discrimination in the delivery of protective city services.

Id. at 742–43.

In support of its holding, the court reviewed cases from several other circuits. *Id.* at 740–42. Notably, each of those cases involved a plaintiff challenging the actions of a third party uninvolved in the sale or rental of a dwelling. *See Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207 (7th Cir. 1984) (involving allegations that a county's refusal to properly manage properties it owned damaged plaintiffs' neighboring property); *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, 388 F.3d 327, 329 (7th Cir. 2004) (involving religious harassment of plaintiffs by the president of the neighborhood homeowner's association); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999)

(involving government's decision to locate a highway near plaintiffs' neighborhood); *Tenafly Eriv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002) (involving the city's removal of religious objects from utility poles); *Clifton Terrace Assocs., Ltd. v. United Techs. Corp.*, 929 F.2d 714 (D.C. Cir. 1991) (involving claims that elevator manufacturer refused to service the elevators at a housing complex owned by plaintiff). The court cited these cases for the proposition that "§ 3604(a) does not apply to current homeowners whose complaint is that the value or 'habitability' of their houses has decreased because such a complaint is not about 'availability.'" *Cox*, 430 F.3d at 741.

With regard to the § 3604(b) claim, the *Cox* court held that "the 'services' subject to the alleged discrimination must be 'in connection' with the 'sale or rental of a dwelling,'" and "[t]he claims here do not assert the requisite connection between the alleged discrimination and the sale or rental of a dwelling—that is, § 3604(b) does not aid plaintiffs, whose complaint is that the value or 'habitability' of their houses has decreased." *Id.* at 746. The court further stated: "This is not to say that § 3604(b) applies only if the plaintiff was precluded from finding housing. For example, § 3604(b) may encompass the claim of a current owner or renter for attempted and unsuccessful discrimination relating to the initial sale or rental or for actual or constructive eviction." *Id.*[6]

The court also left room for a more expansive reading of what constitutes a service "in connection" with the sale or rental of a dwelling than Defendants in this case suggest, stating that "one can still conceivably connect police and fire protection to the 'sale or rental of a dwelling' (especially rental)." *Id.* at 746 n.36 (citing *Southend Neighborhood*, 743 F.2d at 1210; *Jersey*

[6] *Cox* also recognized that § 3604(a) may encompass a claim for actual eviction. *Id.* at 742. Evicting a tenant on a discriminatory basis clearly makes housing "unavailable" in violation of § 3604(a). Plaintiff has alleged that her eviction was based on a discriminatory motive, and therefore her § 3604(a) claim should not be dismissed. *See infra* Part III.E.2.

Heights, 174 F.3d at 193 (holding that § 3604(b) applies to "garbage collection and other services of the kind usually provided by municipalities")).

The *Cox* court found that the City's alleged conduct—failure to enforce zoning laws, not against plaintiffs' property, but against an adjacent property—too attenuated to maintain a claim under the FHA. In contrast, the case before this Court involves direct actions by a landlord's agent, a person clearly involved in the rental of a dwelling and in providing "services or facilities in connection therewith," to discriminate against a current tenant on the basis of sex. *Cox* does not address the question of whether actions by a landlord or his agent against a current tenant can be discrimination "in connection" with the rental of a dwelling. Sexual harassment is precisely the type of conduct that the FHA should prohibit both before and during tenancy, and this Court should decline to join the other district courts that have extended *Cox* more broadly to apply in the landlord-tenant context.[7] *See, e.g.*, *Hood v. Pope*, No. CIV.A. H-14-1665, 2015 WL 225042, at *5 (S.D. Tex. Jan. 15, 2015) (citing *Cox* and holding that plaintiffs' claims of harassment "do not pertain to the initial rental of the unit and therefore do not state a claim under Section 3604"); *Terry v. Inocencio*, No. 3:11-CV-0660-K-BK, 2014 WL 4686570, at *8 (N.D. Tex. Sept. 2, 2014) report and recommendation adopted, No. 3:11-CV-0660-K-BK, 2014 WL 4704629 (N.D. Tex. Sept. 22, 2014) (interpreting *Cox* as rejecting habitability claims under § 3604(a) and, though holding that "the imposition of discriminatory conditions upon a tenant's lease violates Section 3406(b)," finding no lease provisions implicated); *Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp. 2d 721, 729 (S.D. Tex. 2010) (interpreting *Cox* as "finding that both §§ 3604(a)–(b) requires a showing that discrimination affected housing availability"); *AHF*

[7] The Fifth Circuit has cited *Cox* in support of an unpublished per curiam decision holding that "[Plaintiff's] claims under §§ 3604 and 3617 of the FHA fail because they go to the habitability of her condominium and not the availability of housing." *Reule v. Sherwood Valley I Council of Co-owners, Inc.*, 235 F. App'x 227 (5th Cir. 2007). The court gave no additional analysis or further detail about the claims.

Cmty. Dev., LLC v. City of Dallas, 633 F. Supp. 2d 287, 302 (N.D. Tex. 2009) (interpreting *Cox* to limit § 3604(b) claims to those based "on the availability and acquisition, rather than on the habitability and enjoyment, of property").[8]

It is unclear what the *Cox* court meant when it suggested that perhaps claims of "attempted or unsuccessful discrimination" could go forward under § 3604(b). 430 F.3d at 746. Discrimination is "successful" if a prospective or current tenant is treated differently based on race, color, religion, sex, familial status, national origin, or disability, regardless of whether the discrimination is ultimately so successful that it drives the tenant from the property. Indeed, prior to *Cox*, the Fifth Circuit held that a landlord's actions to discriminate against current tenants violated § 3604(b). In *Woods-Drake v. Lundy*, the court held:

> It is evident that when a landlord imposes on white tenants the condition that they may lease his apartment only if they agree not to receive blacks as guests, the landlord has discriminated against the tenants in the "terms, conditions and privileges of rental" on the grounds of "race." Therefore, the imposition upon white tenants of a rule that they may not receive black guests violates the Fair Housing Act.

667 F.2d at 1201. The court further reasoned that "[t]he provisions of 42 U.S.C. § 3604 are to be given broad and liberal construction, in keeping with Congress' intent in passing the Fair Housing Act of replacing racially segregated housing with 'truly integrated and balanced living patterns.'" *Id.* (quoting *Trafficante*, 409 U.S. at 211). The *Cox* court cited *Woods-Drake* approvingly. 430 F.3d at 746–47.

In a sexual harassment case, a landlord's discrimination may be inflicted on tenants whose housing options are so limited that the choice is, in effect, to endure or submit to the

[8] The cases cited by Defendants in support of *Cox*, Defs. Mem. at 7–8, do not involve § 3604(b) claims against a landlord by a current tenant. *Cox v. Phase III, Investments*, No. CIV.A. H-12-3500, 2013 WL 3110218, at *1 (S.D. Tex. June 14, 2013) (discussing *Cox* as applied to claims under § 3604(a)); *Lopez v. City of Dallas, Tex*, No. 3:03-CV-2223-M, 2006 WL 1450520, at *8–9 (N.D. Tex. May 24, 2006) (applying *Cox* to allegations that the City had provided "different and inferior municipal services" in violation of § 3604(b) and dismissing the claims as unrelated to the initial sale or rental of a dwelling).

landlord's demands or to be homeless. As alleged in Plaintiff's complaint, Live Oak Manor was the only low-income subsidized housing complex in Abbeville with available apartments, Amend. Compl. ¶ 12, giving Ms. Mouton few, if any, other options. Plaintiff also alleges that the sexual harassment intensified after she moved in, including Mr. Augustine entering her apartment without notice or permission. *Id.* ¶¶ 44, 49–52. To hold that Mr. Augustine's pre-acquisition harassment is prohibited by the FHA, but his more egregious post-acquisition harassment is not, is untenable, especially when it is his position as the landlord's manager that gave him possession of a key and the ability to grant or deny services such as maintenance repairs based on Ms. Mouton's willingness to submit to his demands. Furthermore, as discussed below, because the landlord-tenant relationship is created at the initial rental of the dwelling, *Cox* does not prevent Ms. Mouton from recovering for the harassment that occurred after she rented the apartment.

D. The Ongoing Landlord-Tenant Relationship Involves Terms, Conditions, and Privileges Connected to the Acquisition of Housing

It is clear that the FHA places obligations on a landlord and his agents to refrain from discrimination in all parts of the landlord-tenant relationship, regardless of the existence of a lease. The continuing landlord-tenant relationship, and the obligations attaching thereto, are created at the initial rental and are therefore connected to the acquisition of housing. In deciding *Cox*, the Fifth Circuit relied on the Seventh Circuit's decision in *Halprin*. *Cox*, 430 F.3d at 741. Since *Cox* was decided, however, the Seventh Circuit has clarified that *Halprin* should be read more narrowly. In *Bloch v. Frischholz*, the Seventh Circuit ruled that post-sale conduct by a homeowner's association ("HOA") could violate § 3604(b). In that case, the Blochs alleged that the HOA had discriminated against them in the "terms, conditions, and privileges of sale . . . of a dwelling" by enforcing an HOA rule in a discriminatory manner. 587 F.3d at 779–80. In

sustaining the Blochs' claim, the Seventh Circuit reasoned, "The Blochs alleged discrimination by their condo association, an entity by which the Blochs agreed to be governed when they bought their units. This agreement, though contemplating future, post-sale governance by the Association, was nonetheless a term or condition of sale that brings this case within § 3604(b)." *Id.* (citing *Cox*, 40 F.3d at 476, and *Woods-Drake*, 667 F.2d at 1201). The Seventh Circuit continued:

> This contractual connection between the Blochs and the Board distinguishes this case from *Halprin*. *Halprin* made it clear that § 3604(b) is not broad enough to provide a blanket "privilege" to be free from all discrimination from any source. . . .
>
> Here, however, the Blochs' agreement to subject their rights to the restrictions imposed by the Board was a "condition" of the Blochs' purchase; the Board's power to restrict unit owners' rights flows from the terms of the sale. And the Blochs alleged that the Board discriminated against them in wielding that power. Consequently, because the Blochs purchased dwellings subject to the condition that the Condo Association can enact rules that restrict the buyer's rights in the future, § 3604(b) prohibits the Association from discriminating against the Blochs through its enforcement of the rules, even facially neutral rules.

Id. at 780. The Seventh Circuit also recognized that allowing the § 3604(b) claims to go forward in this manner is consistent with HUD's regulations. *Id.* at 780–81 (citing 24 C.F.R. § 100.65(b)(4)). Other courts have followed *Bloch*'s reasoning. *See Savanna Club Worship Serv. v. Savanna Club Homeowners' Ass'n*, 456 F. Supp. 2d 1223, 1230 (S.D. Fla. 2005) ("[P]art and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community."); *Paradise Gardens Section II Homeowners' Ass'n v. HUD*, 8 F.3d 36 (11th Cir. 1993) (Table), aff'g 1992 WL 406531 (HUDALJ Oct. 15, 1992); *Landesman v. Keys Condo. Owners Ass'n*, No. 04-2685, 2004 WL 2370638 (N.D. Cal. Oct. 19, 2004).

Like *Halprin* and *Bloch*, the Fifth Circuit's decision in *Cox* can be distinguished from the

facts of this case. In *Cox*, the plaintiffs were alleging that the City of Dallas had violated the Fair Housing Act by failing to prevent illegal dumping near plaintiffs' homes; it did not involve a contractual relationship created at the time of the sale of the plaintiffs' property. This case, however, is more closely analogous to *Bloch*. Ms. Mouton's acquisition of housing at Live Oak Manor involved the creation of a legal relationship between her, the owner, and the manager through the lease agreement and the applicable law.[9] The landlord-tenant relationship places obligations on the landlord that are created at the acquisition of housing but remain in effect throughout the duration of the tenancy. Therefore, Section 3604(b) prohibits the landlord, like the HOA in *Bloch*, from discriminating against Ms. Mouton through, for example, its application or enforcement of the terms of the lease or the rules and policies of the apartment complex. *See Richards v. Bono*, No. 5:04CV484-OC-10GRJ, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005) (rejecting defendants' argument that post-acquisition sexual harassment is not actionable and holding that "[b]ecause the plain meaning of 'rental' contemplates an ongoing relationship, the use of that term in § 3604(b) means that the statute prohibits discrimination at any time during the landlord/tenant relationship, including after the tenant takes possession of the property").

The lease signed by both Ms. Mouton and the landlord on June 15, 2011, provides examples of the obligations placed on the landlord as part of the landlord-tenant relationship. The lease states that the landlord must "provide reasonable advance notice of his/her intent to enter the unit, and to enter the unit only after receiving the Tenant's consent to do so, except when urgency situations make such notices impossible." ECF No. 1-2, Model Lease for

[9] State and local laws generally impose rights and obligations on landlords and tenants upon agreement to rent a unit that govern until the relationship is terminated. *See, e.g.*, La. Civ. Code Ann. art. 2691 ("During the lease, the lessor is bound to make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the lessee is responsible.")

Subsidized Programs, at 12. Therefore, Mr. Augustine's failure to follow that policy in furtherance of his sexual harassment of Ms. Mouton, *see* Amend. Compl. ¶¶ 49–52, is discrimination tied to the ongoing rental relationship in violation of § 3604(b). The landlord is also required to "make necessary repairs with reasonable promptness." ECF No. 1-2 at 7. If Mr. Augustine failed to make requested repairs because Ms. Mouton would not submit to his sexual demands, *see* Amend. Compl. ¶¶ 53–55, then he has violated § 3604(b). Accordingly, Defendants' motion should be denied, and Plaintiff's allegations with respect to conduct occurring after she rented the apartment should go forward.

E. Plaintiff's Complaint Sufficiently Alleges Violations of § 3617

Defendants argue that Ms. Mouton's eviction was due to non-payment of rent, and therefore Plaintiff cannot bring a claim under § 3617 of the FHA. Defendants are incorrect in several respects. First, Defendants' motion relies on the argument that post-acquisition conduct is not covered by the FHA and wrongly assumes that the eviction is the only conduct that supports Plaintiff's § 3617 claim. Second, Plaintiff may sustain a claim on the basis that Ms. Mouton's eviction was not due to non-payment of rent, but rather that Defendants pursued eviction because Ms. Mouton would not acquiesce to Mr. Augustine's sexual demands, and non-payment was merely pretext.

1. Section 3617 prohibits a broad range of conduct and is not limited to eviction.

Defendants' arguments that Plaintiff's § 3617 claim should be dismissed rely primarily on the argument that discriminatory eviction is the only post-acquisition conduct that is prohibited by the FHA. *See* Defs. Mem. at 8–11. However, the plain language of § 3617 clearly applies to post-acquisition conduct much broader than eviction or constructive eviction. That section makes it "unlawful to coerce, intimidate, threaten, or interfere with any person in the

exercise or enjoyment of, or on account of his having exercised or enjoyed" any right granted or protected by, among others, § 3604(a) and (b). 42 U.S.C. § 3617. Accordingly, if a family rents a dwelling and then faces sexual, religious, or racial discrimination in connection with the "terms, conditions, or privileges" of tenancy, they have endured "interfere[nce]" with their "enjoyment" of their § 3604(b) rights, which is actionable under § 3617. In addition, HUD's regulations give the following examples of conduct prohibited by § 3617:

> (1) Coercing a person, either orally, in writing, or by other means, to deny or limit the benefits provided that person in connection with the sale or rental of a dwelling . . . because of . . . sex. . . .
> (2) Threatening, intimidating or interfering with persons in their enjoyment of a dwelling because of the . . . sex . . . of such persons, or of visitors or associates of such persons.

24 C.F.R. § 100.400.

The Fifth Circuit's decision in *Cox* does not address whether post-acquisition claims are cognizable under § 3617. 430 F.3d at 740, 745 (discussing claims made under §§ 3604(a) and (b)). In *Halprin*, the Seventh Circuit did conclude that § 3617 covered only post-acquisition conduct, 388 F.3d at 330; however, the Seventh Circuit has since "effectively overrule[d]" *Halprin* on this issue. *Bloch*, 587 F.3d at 782. In *Bloch*, the court recognized that, consistent with HUD regulations, "[i]nterference with the 'enjoyment of a dwelling' could only occur post-sale." *Id.* at 781. Further, the court held that certain post-acquisition conduct, including threats of eviction, clearly violates § 3617:

> For instance, if a landlord rents to a white tenant but then threatens to evict him upon learning that he is married to a black woman, the landlord has plainly violated § 3617, whether he actually evicts the tenant or not. . . .
>
> Though § 3604 requires that the plaintiffs' dwelling be made truly unavailable, or that defendants deprived plaintiffs of their privilege to inhabit their dwelling, the text of § 3617 is not so limited. We agree with the Blochs (and the United States, appearing as amicus in this case) that § 3617 reaches a broader range of post-acquisition conduct. A claim for coercion, intimidation, threats, and interference

> with or on account of plaintiff's § 3604 rights does not require that the plaintiff actually vacate the premises.

Id. at 782; *see also Hidden Village, LLC v. City of Lakewood, Ohio*, 734 F.3d 519, 528 (6th Cir. 2013) (recognizing conduct unrelated to acquisition as violating § 3617); *Neudecker*, 351 F.3d at 364–35 (finding that "unwelcome harassment was sufficiently severe to deprive [plaintiff] of his right to enjoy his home"); *Krueger v. Cuomo*, 115 F.3d 487, 491 (7th Cir. 1997) (affirming ALJ decision that defendant's "continued campaign of harassment" violated § 3617); *Richards*, 2005 WL 1065141, at *6 ("Sex discrimination occurring after the initial possession of rental property may constitute unlawful intimidation, coercion, or interference on account of having exercised the right to obtain housing.").

Plaintiff's Complaint alleges conduct by Defendants that violates § 3617 apart from the discriminatory eviction. Mr. Augustine's conduct, including his repeated unwelcome solicitation of Ms. Mouton, Amend. Compl. ¶¶ 16, 19, 21, 26, 35, 45, 56, 61, unwelcome touching, *id.* ¶¶ 23, and entering her apartment without notice or permission, *id.* ¶¶ 45, 52 is conduct that constitutes coercion, intimidation, and interference with Ms. Mouton's right to enjoy her home free from discrimination.

In addition, Defendants' assertion that threats of eviction do not violate the FHA if they are not acted upon, Defs. Mem. at 9–10, is incorrect. In *Woods-Drake*, the Fifth Circuit clearly held that "threatening to evict plaintiffs if they continued to have black guests" violated § 3604(b). 667 F.2d at 1201. Such action also clearly falls within the plain language of § 3617, which makes it illegal to "coerce, intimidate, threaten, or interfere" with a tenant's exercise of her housing rights. As noted above, *Bloch* also held that threats of eviction violate §3617, whether acted upon or not. 587 F.3d at 782. The case cited by Defendants, *Congdon v. Strine*, 854 F. Supp. 355 (E.D. Pa. 1994), did not declare a blanket rule that an incomplete eviction

cannot violate § 3617, but rather was decided on the particular facts of that case. *Id.* at 363–64. Other courts have determined that threats of eviction can violate the FHA. *See, e.g.*, *Neudecker*, 351 F.3d at 364 (holding that threats of eviction, though not carried out, were sufficient to sustain claim under § 3617); *Smith v. Powdrill*, No. CV 12-06388, 2013 WL 5786586, at *10 (C.D. Cal. Oct. 28, 2013) (distinguishing *Congdon* and finding that issuance of a 3-day notice and statements that the landlord wanted plaintiff to move out violated § 3617). Furthermore, Plaintiff alleges that Mr. Augustine issued the eviction notices to give himself additional opportunities to harass Ms. Mouton, *see* Amend. Compl. ¶ 61, and that harassment itself violates § 3617.[10]

2. Plaintiff has sufficiently alleged that her eviction was based on a discriminatory motive.

Defendants assert that Ms. Mouton cannot maintain a claim that she was evicted because of discrimination because there is evidence in the record that she was having problems paying her rent, and therefore non-payment of rent was not a pretext for discrimination. Defs. Mem. at 9. Whether a defendant's motives are a pretext for discrimination is generally a factual issue. *See, e.g. Keys Youth Servs., Inc. v. City of Olathe*, 248 F.3d 1267, 1274 (10th Cir. 2001). "A motion under Rule 12(b)(6) tests the formal sufficiency of the Plaintiff's statement of a claim for relief, and cannot be used to resolve factual issues or the merits of the case." *Bessant v. Wells Fargo Bank, Nat'l Ass'n*, No. 4:13CV306, 2013 WL 5203784, at *2 (E.D. Tex. Sept. 12, 2013). The documents Defendants cite do not support their characterization of what Ms. Mouton has or

[10] Even if Defendants were correct that § 3617 does not cover post-acquisition conduct, Plaintiff's claim should not be dismissed because Mr. Augustine's alleged conduct *prior* to renting an apartment to Ms. Mouton also violates § 3617. Mr. Augustine's harassment of Ms. Mouton began at their first meeting, when Ms. Mouton asked about an apartment for rent. Amend. Compl. ¶¶ 11–17. On that first meeting, and then repeatedly over the course of several days, Mr. Augustine asked Ms. Mouton for a date, asked for sexual intercourse, and touched her inappropriately. *Id.* ¶¶ 17–40. This conduct continued from January 2011 through June 15, 2011, when Ms. Mouton was finally able to sign a lease. *Id.* ¶¶ 17–41. This conduct clearly constitutes coercion, intimidation, and interference with Ms. Mouton's right to rent the apartment and violates § 3617.

has not admitted, and the motivation behind the eviction and whether Ms. Mouton was justified in withholding rent are clearly disputed facts. Amend. Compl. ¶¶ 60–62, 68–76. Accordingly, Plaintiff has stated a claim under § 3604(a) and § 3617 related to the eviction.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2015, a copy of the foregoing Statement of Interest was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

s/ Andrea K. Steinacker
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